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STATUTES CITED.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 456

UNIVERSAL INSURANCE COMPANY,
Appellant,

vs.

STATE BOARD OF TAX APPEALS OF THE STATE OF NEW JERSEY AND THE CITY OF NEWARK,
Respondents.

UNIVERSAL INDEMNITY INSURANCE COMPANY,
Appellant,

vs.

STATE BOARD OF TAX APPEALS OF THE STATE OF NEW JERSEY AND THE CITY OF NEWARK,
Respondents.

STATEMENT OF BASIS OF JURISDICTION OF THE SUPREME COURT UNDER RULE 12, PARAGRAPH 1.

The appellants contend that the basis upon which the Supreme Court of the United States has jurisdiction to review the judgment of the Court of Errors and Appeals, is:

First.

The statutory provision sustaining the jurisdiction is found in United States Code Annotated, Title 28, Section ~~341~~-a (formerly Judicial Code Section 237):

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

This statute is also found in 43 Statutes 937 Chapter 229 of the Laws of 1925.

Second.

Statute of the State the validity of which is involved. Chapter 236 of the Laws of 1918, Section 202:

> "All property, real and personal, within the jurisdiction of this state, not expressly exempted by this act or excluded from its operation, shall be subject to taxation annually under this act at its true value, and shall be valued by the assessors of the respective taxing districts. Property omitted by the assessors may be assessed as hereinafter provided. All property shall be assessed to the owners thereof with reference to the amount owned on the first day of October in each year, and the persons so assessed for personal prop-

erty shall be personally liable for the taxes thereon. (P. L. 1918, p. 848.)"

Section 301:

"The tax on all tangible personal property in this State and on all taxable personal property of non-residents of this State shall be assessed in and for the taxing district where such property is found. The tax on other personal property shall be assessed on each inhabitant in the taxing district where he resides on the first day of October in each year. Personal property in the possession or under the control of any person as trustee, guardian, executor or administrator shall be assessed in his name as such, separate from his individual assessment, or in the name of any of several joint trustees, guardians, executors or administrators, if the one of them having actual control or possession cannot be ascertained by the assessor; but the personal property belonging to the estate of any decedent shall be assessed in the taxing district wherein the decedent resided at the time of his death, except such part of the tangible property thereof as may be actually located in some other taxing district in this State and assessed therein. Personal property consisting of stocks in trade and materials used in manufacture in this State, which shall include raw materials, fuel, goods in process of manufacture and completed products, shall be estimated at the average of such personalty located in the taxing district during the year preceding the date as of which the assessment is made, or the average for such portion of the year that such property may be in the possession of the person assessed. (P. L. 1918, p. 853, as amended by P. L. 1920, p. 561.)"

Section 307:

"Every fire insurance company and every stock insurance company other than life insurance shall be assessed in the taxing district where its office is situate,

upon the full amount of its capital stock paid in and accumulated surplus; the real estate belonging to every such corporation, however, shall be taxed in the taxing district where such real estate is situated, and the amount of assessment upon said real estate shall be deducted from the amount of any assessment made upon the capital stock and accumulated surplus, as herein provided for; no franchise tax shall be imposed upon any such fire insurance company or other stock insurance company included in this section. (P. L. 1918, p. 858.)"

These sections were in effect at the time this tax was levied, but have since been revised and are now found in Revised Statutes of New Jersey, 1937, Sections 54:4-1, 54:4-9 and 54:4-22:

"54:4-1. Property subject to tax; date of assessment. All property, real and personal, within the jurisdiction of this state not expressly exempted from taxation or expressly excluded from the operation of this chapter shall be subject to taxation annually under this chapter at its true value, and shall be valued by the assessors of the respective taxing districts. Property omitted by the assessors may be assessed as hereinafter provided. All property shall be assessed to the owner thereof with reference to the amount owned on October first in each year, and the person so assessed for personal property shall be personally liable for the taxes thereon."

"54:4-9. Personal property; where assessed. The tax on all tangible personal property in this state and on all taxable personal property of non-residents of this state, except as otherwise provided in this title, shall be assessed in and for the taxing district where the property is found. The tax on other personal property shall be assessed on each inhabitant in the taxing district where he resides on October first in each year."

54:4-22—Same as Section 307.

It is contended that the question before the Court of rrors and Appeals and all of the lower courts was the lidity of the sections of the statutes quoted, on the ground at said statutes were repugnant to the 14th Amendment the Constitution of the United States, and it is now connded that the decision of the Court of Errors and Appeals d its judgment is in favor of the validity of the said secons of the statute and, therefore, the decision may be viewed by the Supreme Court by appeal.

The basis for this contention is: The City of Newark given the power, by the sections of the statutes quoted, levy assessments against the capital stock and accumuted surplus of insurance companies such as petitioners. he time and method of making these assessments are fixed Sections 202 and 301 and Section 307 applies exclusively fire and stock insurance companies. Petitioners' capital d surplus consists of intangible personal property, such accounts receivable, cash and securities, all located at e home office in the City of New York on the taxing date, tober 1, 1934, the date upon which the levy must be ade under the statutes, to fix the 1935 tax. Petitioners ve contended that if the assessments were held valid, at the statutes under which the assessments are made by e City are repugnant to the 14th Amendment, giving the ty the right to levy and assess personal property beyond jurisdiction, and which property has its business *situs* the City and State of New York, beyond the taxing disict of the City of Newark, thus depriving the petitioners their property without due process of law.

The Court of Errors and Appeals, by its decision and dgment, has construed and applied these sections of the atute as permitting and allowing an assessment by the ty of Newark against petitioners' property, although pe-

titioners' business *situs* is in New York City, State of New York, beyond the jurisdiction of the taxing district. Thus there is drawn in question the validity of the statute on the ground that it is repugnant to the Constitution, and the decision is in favor of its validity and it may be reviewed by the Supreme Court under Section 344-a.

Third.

The date of the judgments sought to be reviewed is May 31, 1938, and the date upon which the application for the appeal was presented, was August 16, 1938.

Fourth.

Nature of case, raising of Federal question and rulings of Court.

The constitutional question was first raised before the Essex County Board of Taxation, but there was no ruling made by that Board. On the appeal to the State Board of Tax Appeals, the constitutional question of the validity of the assessment with respect to the property beyond the jurisdiction of the City, was presented and argued in the brief and was definitely passed on in the opinion, as will appear from the printed record (page 15), made a part of the transcript. The State Board, in its opinion, definitely found that the business *situs* of the companies was located in the City and State of New York, but overruled the contention that the assessment, if held valid, would render the State statutes mentioned repugnant to the 14th Amendment to the Constitution, citing the opinion of the Board in the case of the *City of Newark v. Newark Fire Insurance Company*. Copy of this opinion is attached to this statement.

Thus, there was a holding that the City of Newark has jurisdiction to tax intangibles beyond its jurisdiction,

where the business *situs* is elsewhere, and, therefore, the statutes mentioned, upon which the authority of the City to assess rests, are held to give to the City that power and right to assess intangible personal property under these sections, where the intangibles are beyond the jurisdiction and the business *situs* is in the City and State of New York. Therefore, such sections of the statute as applied are repugnant to the 14th Amendment of the Constitution of the United States.

The constitutional question was raised in the reasons set up on the appeal to the New Jersey Supreme Court (printed case page 139). The same constitutional question was argued in the brief and passed upon by the Supreme Court in its opinion (printed State of case page 141). The business *situs* question is determined on the basis of *Newark Fire Insurance Co.* v. *State Board of Tax Appeals*, 118 N. J. Law 525, and a copy of the opinion in that case is attached hereto.

It will be seen from the opinion that in both the present case and in the *Newark Fire* case the question of the business *situs* of the companies here is definitely held to be in New York, so there is no question or dispute on the facts determining that point. (See the first paragraph of the opinion of Mr. Justice Perskie on page 141 of the state of case.)

The gist of the argument is that double taxation is not illegal, under the decisions of the Supreme Court of the United States, cited in the opinion, and the decision in the *Universal* cases, by the opinion of the Supreme Court, is based upon the *Newark Fire* opinion. While the opinion in the *Newark Fire* case does not definitely mention that the sections of the Tax Act referred to are repugnant to the 14th Amendment, by upholding the assessment, the effect of the sustaining of the right of the City to tax intangibles

beyond its jurisdiction has the same effect, and the Supreme Court in the case of petitioners affirmed the jurisdiction of the City to tax on the same basis as set forth in the opinion in the *Newark Fire* case.

These same constitutional questions were set up in the Court of Errors and Appeals, argued in the brief, and that court affirmed on the opinion of the Supreme Court, 120 N. J. L. 185. (See copy of opinion attached.)

The decisions of the Supreme Court of the United States which sustain the jurisdiction of the Supreme Court of the United States to review upon appeal are: *Safe Deposit & Trust Co. v. Virginia,* 280 U. S. 83; *Wheeling Steel Corp. v. Fox,* 298 U. S. 193; *Myles Salt Co. v. Board of Commissioners,* 239 U. S. 478; *Fox River Paper Co.* v. *The Commission,* 274 U. S. 651; *Fiske* v. *State of Kansas,* 274 U. S. 380; *First Bank Stock Corp.* v. *Minnesota,* 301 U. S. 234.

It is sufficient to confer jurisdiction, if the highest court of a State holds that the statutes as administered and applied, as in the case at bar, are not contrary to the 14th Amendment. The decision of the Court of Errors and Appeals and of the Supreme Court upon which it is based, have so applied and administered the statutes under which the assessments by the City were made.

In *Lynch* v. *New York ex rel. Pierson,* 293 U. S. 52-55, it is said:

> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. * * * (Citing cases). Where the judgment of the state court rests on two grounds, one involving a federal question and the other

> not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction." (Citing cases.)

In the case at bar, the Court of Errors and Appeals must have necessarily based its judgment on the Federal question, in holding that the assessments in question were valid. The Supreme Court held that as to the jurisdiction to tax, the case at bar must follow the *Newark Fire Insurance Company v. The State Board, supra,* and in the latter case the Supreme Court in its opinion squarely held that a personal property tax might be levied by the State of the domicile of the corporation upon intangible personal property, with its business *situs* beyond the jurisdiction. In so holding, the Supreme Court, in that case, followed the doctrine of the *Cream of Wheat* case, reported in 253 U. S. 325. That latter case held squarely that the 14th Amendment does not prevent double taxation and

> "the limitation of the 14th Amendment upon the power of the State to tax the property of its residents which has acquired a permanent *situs* outside the State, does not apply to intangible property, even though it has acquired a business *situs* and is taxable in another State."

The judgment of the Court of Errors and Appeals in the case at bar, in so far as the jurisdiction to tax is concerned, rests upon the decision of the Supreme Court, and that decision in turn is disposed of and settled by the Newark Fire Insurance opinion. Therefore, the judgment of the Court of Errors and Appeals in the case at bar was necessarily based upon the Federal question, as to whether the assessment of the petitioners' intangible personal property, having its business *situs* outside the jurisdiction, under the statutes mentioned, was repugnant to the 14th Amendment

to the Constitution of the United States, and does not deprive the petitioners of their property without due process of law.

In *Wheeling Steel Company* v. *Fox, supra,* it is noticeable that the opinion of the lower court, found in 177 Southeastern Rep. 535, 104 A. L. R. 802, does not expressly mention the constitutional question, but holds that the intangible property, although outside of the jurisdiction, is taxable at the business *situs.* The United States Supreme Court assumed jurisdiction. A constitutional question was necessarily decided in that case, which is similar to the decision of the highest court in the case at bar.

There are several questions decided by the Supreme Court in addition to the Federal question, but all of those questions related to the method of arriving at the assessment on the capital stock and accumulated surplus under the statute, assuming *first* that the City had the power to tax. Consequently the decision of the Federal question was essential and if the City had no jurisdiction to tax, then, of course, the other questions were not necessary to the decision at all, so the judgment of the State Court here rests on the Federal question, and all the other questions are merely incidental and involve only the amount of the assessment.

Fifth.

The question here involved is substantial.

The opinion of the Supreme Court in *Newark Fire Insurance Co.* v. *State Board of Tax Appeals,* 118 N. J. Law 525, adopted by the Court of Errors and Appeals as its own opinion in affirming the judgment in that case, is sufficient ground to show that the question here presented is a very substantial one. Reference to a copy of the opinion in that case shows that the first question argued was as to the jurisdiction to tax prosecutor in this State. The court says that:

"This question must, in the light of the proofs be considered upon the inescapable premise that prosecutor had its business *situs* as of October 1, 1934 and still has, in New York."

In the case at bar the opinion says:

"The facts in the case at bar are practically identical, save as to the names of the parties, their respective addresses here and in New York, and the facts were those set forth in the case of Newark Fire Insurance Company *v.* State Board of Tax Appeals, 118 N. J. Law 525."

Both of these opinions were adopted by our Court of Errors and Appeals and are dispositive of the question of fact as to the business *situs* of the petitioner here, which must be held to be in New York State.

In the *Newark Fire Insurance* case, the opinion then proceeds to review the business *situs* doctrine as applied to personal property taxation, citing the well known doctrine that intangibles first were held to be taxable at the domicile of the owner and later the Supreme Court had made an exception in holding that the State where intangibles had acquired a business *situs* had jurisdiction to levy a personal property tax upon the intangibles. Then the question arose as to whether, when the business *situs* theory did apply, the State of the domicile could tax. The opinion then says:

"The answer to that question is not free from serious doubt, a doubt which the Supreme Court of the United States has found, notwithstanding its holding that the state of the domicile might tax, even though the business *situs* theory applied. Cream of Wheat Co. *v.* County of Grand Forks, 253 U. S. 325."

The opinion then goes on to trace the "growing tendency of the doubt", citing the case of *Frick* v. *Pennsylvania,* 268 U. S. 473, holding that tangible property may be taxed only

in one State where it is located, and that in the absence of a business *situs* outside of the domicile, only the State of the domicile might tax intangibles. Citing *Farmers Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204. The Court then goes on to say:

> "In so holding the court was very careful to point out, notwithstanding its holding in the Cream of Wheat case, that the question involving the right of the domiciliary state to tax when the business *situs* question applies, is an open one. Decision thereof has been specially reserved. Farmers Loan & Trust Co. *v.* Minnesota, (at page 213) and First National Bank of Boston *v.* Maine (at page 331)."

The opinion then goes on to say that since there has been no express overruling of the *Cream of Wheat* case, that this Court is bound to hold that the domicilary State may impose a tax.

The facts in the petitioners' case raise directly the point which the New Jersey Supreme Court says has never been definitely decided. Here is the domiciliary State of the petitioners seeking to tax intangibles at their business *situs* elsewhere. The *Cream of Wheat* case has never been expressly overruled, but great doubts have been cast upon the right of the domiciliary State to tax where the intangibles are out of the jurisdiction. The facts here appearing in the record, squarely raise this question before this Court, and it must be considered substantial, in view of the number of recent cases bearing on the point, such as *Wheeling Steel Co.* v. *Fox, First Bank Stock Corp.* v. *Minnesota, supra,* and *Whitney* v. *Graves.* Yet, the question appears to be open.

The New Jersey Supreme Court, in its opinion, refers to the fact that there is no personal property tax levied

against the prosecutors in New York, but we say that this does not alter the situation, because even though this be true, it would not give the domiciliary State the jurisdiction to tax on property outside of the jurisdiction.

Buck v. *Beach*, 206 U. S. 392, is authority for the point that the companies are not taxable in New Jersey merely because there is no personal property tax on insurance companies in New York. The Court said:

> "An attempt to escape probable taxation in Ohio does not confer jurisdiction to tax property asserted to be in Indiana. The question still remains, was there any property within the jurisdiction of the State of Indiana."

Johnson Oil Co. v. *Oklahoma*, 290 U. S. 158; *Farmers Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204, and *Southern Pacific* v. *Kentucky*, 222 U. S. 63.

In *Commonwealth* v. *West India Oil Co.*, 192 S. W. 301 (Kentucky), it was sought to tax the accounts due the defendant in the State of Kentucky, which was a Kentucky corporation, with its principal registered office located there and all of its property and entire business located in Cuba and Puerto Rico, where all the accounts were collected and money was kept. The only jurisdiction the court acquired was the fact that the domicile of the corporation was in Kentucky and it had its principal office there. It was held that the defendant was not taxable in Kentucky, under the Kentucky statute, on its personal property, and the court went on to say:

> "The question is not, therefore, whether the property has been taxed in Cuba. The question is, is it taxable here? If not taxed there it still may be, but if not, it does not give this court jurisdiction to tax it here."

indicating that the fact that there was no personal property tax in New York levied against the prosecutors, had nothing to do with the legal right of the City of Newark to tax in New Jersey.

JEHIEL G. SHIPMAN,
JOHN G. JACKSON,
Attorneys for and of Counsel with Petitioners-Appellants.

EXHIBIT "A".

NEW JERSEY SUPREME COURT.

MAY TERM, 1937.

No. 208.

NEWARK FIRE INSURANCE COMPANY, *Prosecutor*,

v.

STATE BOARD OF TAX APPEALS and CITY OF NEWARK, a Municipal Corporation of the State of New Jersey, *Respondents*.

Submitted May —, 1937 Decided August 31, 1937.

On Certiorari.

Before Justices Bodine, Heher and Perskie.

For prosecutor: Arthur T. Vanderbilt.
For respondents: Frank A. Boettner, John A. Matthews.

The opinion of the court was delivered by PERSKIE, *J.*:

The question before us concerns the validity of the personal property assessment made by the City of Newark on October 1, 1934, for the year 1935 against prosecutor. The assessment was made in accordance with our general tax act. P. L. 1918, chap. 307, p. 858, as amended.

Prosecutor is a general fire insurance company organized under the laws of this state with its registered office at 31 Clinton Street, in the City of Newark. For six years prior to the assessment its main and executive offices have been and now are at 150 William Street, in the City of New York. Prosecutor's general business is conducted in New York, and all the books of the company, except those required by law to be kept at its registered office in New Jersey, are located there. Although a small amount of cash and some few securities are kept in New Jersey so that business may be done here, the great majority of these items

is either in the New York Offices or in banks in that State. The business conducted at the Newark office is confined to local regional underwriting and the adjustment of claims arising therefrom. Reports on such business are sent to the main office in New York. The record also discloses that prosecutor pays no personal property tax in New York, and, for aught that appears, no such tax is exacted by that State.

The State Board of Tax Appeals affirmed the assessment as made by the taxing authorities of Newark thereby assessing the intangible property owned by prosecutor. This court granted certiorari and prosecutor argues that the assessment as made should be reduced because (1) New Jersey has no jurisdiction to tax the intangibles; and (2) because it was error to include the item of unearned premium reserve as a taxable asset.

First. *As to jurisdiction to tax prosecutor in this State.* This question must, in light of the proofs, be considered upon the inescapable premise that prosecutor had its business *situs* as of October 1, 1934, and still has it, in New York; that the securities, the personalty involved, have become an integral part of its business *situs* in New York; but that prosecutor pays no personal property tax to the State of New York.

It is fundamental that jurisdiction to tax depends primarily on the type of tax sought to be exacted and the property that is subject to the tax. Here the tax, under the act, is a personal property tax. The property subject to the tax constitutes securities which represent paid in capital stock and accumulated surplus of the company. Such securities are clearly intangibles. It is well settled that intangible personalty is taxable at the domicil of the owner. Kirtland *v.* Hotchkiss, 100 U. S. 491; Blodgett *v.* Silberman, 277 U. S. 1; Farmers Loan & Trust Co. *v.* Minnesota, 280 U. S. 204. That principle finds its support in the legal maxim *mobilia sequuntur personam.* The use of this maxim like the use of most other maxims in jurisprudence, is not the solution of the problem; it is merely a formal and unexplanatory statement of a legal conclusion. Cf. 9 Harvard Law Review 13; 8 Am. L. Rev. 519. Thus frequently its use is not very helpful. But since contrary to the case of

tangibles, intangibles have no actual *situs*, are not physically under the definite control of any one jurisdiction, the rule, as embraced in the maxim developed is justified even to this day as a rule of convenience. Convenience however brings hardship. So it was not long before exceptions to the general rule as stated gradually found and worked themselves into the law. Thus it has been held that where intangible personal property became an integral part of a business carried on in a state other than that of the domicil of the owner of the intangibles, then that other state, the state wherein the intangibles acquired a "business *situs*" had jurisdiction to levy a personal property tax upon these intangibles. New Orleans *v.* Stempil, 175 U. S. 309; Metropolitan Life Ins. Co. of N. Y. *v.* New Orleans, 205 U. S. 395; Wheeling Steel Corp. *v.* Fox, 298 U. S. 193; Safe Deposit & Trust Co. *v.* Virginia, 280 U. S. 583; Farmers Loan & Trust Co. *v.* Minnesota, 280 U. S. 204; First National Bank of Boston *v.* Maine, 284 U. S. 312, see 76 A. L. R. 806. Conceding the application of this exception to the general rule, the problem soon arose as to whether, when the "business *situs*" theory did apply, the state of the domicil could still tax. The answer to that question is not free from serious doubt, a doubt which the Supreme Court of the United States has sounded notwithstanding its holding that the state of the domicil might tax even though the "business *situs*" theory applied. Cream of Wheat Co. *v.* County of Grand Forks, 253 U. S. 325. It is interesting to observe the growing tendency of this doubt. It manifests itself both prior to and subsequent to the holding in the Cream of Wheat case. For example, in the case of Union Refrigerator Transit Co. *v.* Kentucky, 199 U. S. 194, decided prior to the Cream of Wheat case, and in the case of Frick *v.* Pennsylvania, 268 U. S. 473, (overruled on other grounds) it was held that tangible property may be taxed only by one state; and again the court has held, since the Cream of Wheat case, that in the absence of the applicability of the "business *situs*" exception, only the state of the domicil might tax intangibles. Farmers Loan & Trust Co. *v.* Minnesota, *supra;* Baldwin *v.* Missouri, 281 U. S. 586; Beidler *v.* South Carolina Tax Commission, 282 U. S. 1; First National Bank of Boston *v.* Maine, *supra.* In so holding the court

was very careful to point out, notwithstanding its holding in the Cream of Wheat case, that the question involving the right of the domiciliary state to tax when the "business *situs*" exception applied is an open one. Decision thereof has been expressly reserved. Cf. Farmers Loan & Trust Co. *v.* Minnesota, *supra,* at p. 213, and First National Bank of Boston *v.* Maine, *supra,* at p. 331. While this doubt has been cast by the highest court of our land, that body has never expressly overruled its decision in the Cream of Wheat case. Until such time as that case is reconsidered, we are bound by its holding that there is a sufficient interrelation between the state of the domicil and the intangibles which have acquired a business *situs* elsewhere to justify the imposition of a personal property tax by the former upon the latter.

Nor do we, by so deciding run afoul of the strong modern sentiment against multiple taxation as manifested by the United States Supreme Court. See Farmers Loan & Trust Co. *v.* Minnesota, *supra,* at p. 212; First National Bank of Boston *v.* Maine, *supra,* at p. 326, 334. For, as has been pointed out, prosecutor pays no personal property tax in New York. Thus under the circumstances here exhibited multiple taxation is impossible. Prosecutor may not invoke the dictum that "the rule of immunity from taxation by more than one state * * * is broader than the application thus far made of it." First National Bank of Boston *v.* Maine, *supra,* at p. 326.

Second. *As to the item of unearned premium reserve.* We are aware of the fact that sound accounting practice may require this item to be booked as a liability. Nor are we unmindful of the many things that may be said in favor of such a requirement. Modern statistical analyses available to companies in the position of prosecutor may and do compute to a very accurate degree just what part of such reserve will be expended each year. But companies control the fund so set up. They invest them and earn a return upon them. Because of these factors our sister states have divided upon the answer to this problem. See 13 A. L. R. 189. *et seq.* Our Court of Errors and Appeals has taken the position that this item, at least for the pur-

pose of taxation, should be considered an asset. City of Trenton *v.* Standard Fire Ins. Co., 77 N. J. L. 575, 73 At. 606. Whether the reserve set up consists of exempt securities, and the exemption of the reserve fund as claimed would thus result in a double deduction is not made clear. But be that as it may, this court is bound by the decision in the case of City of Trenton v. Standard Fire Ins. Co. *supra.*

Third. The parties stipulated before the Board that prosecutor had cash on hand or on deposit as of October 1, 1934 of $532,784.54 of which amount the sum of $6,425.32 was deposited in banks of New Jersey and the balance of $526,359.22 represents cash on hand in either the New York office or on deposit in New York banks. The State Board determined that this item was exempt under P. L. 1933, chap. 165, p. 346. Respondents argument that this determination is incorrect, if properly before us, is sound. Prosecutors cash on hand or on deposit of October 1, 1934 was not exempt; it was taxable. Newark *v.* State Board of Tax Appeals, 118 N. J. L. 131, 191 At. 843. We are, of course, under section 11 of our Certiorari act (1 C. S. (1709-1910) p. 402-406), obliged to "determine disputed questions of fact as well as of law * * *" but that, under the circumstances exhibited and generally stated, means disputes, as to facts or law or both, properly raised. Is the point properly before us? We think not. True, it was raised and disputed before the State Board of Tax Appeals; the latter passed judgment upon it. But it is also true that, save as to the argument made here upon the point, respondents permitted the judgment of the Board to stand unchallenged. It cannot now properly be heard to complain. The fact of the matter is that, notwithstanding its argument to the contrary, respondents conclude their brief with the submission "that the judgment of the State Board of Tax Appeals should be affirmed and the writ of certiorari dismissed."

The judgment of the State Board of Tax Appeals is, therefore, affirmed with costs.

A true copy.

Fred L. Bloodgood,
Clerk.

EXHIBIT "B".

STATE BOARD OF TAX APPEALS, STATE OF NEW JERSEY.

UNIVERSAL INSURANCE COMPANY, *Appellant*,

v.

CITY OF NEWARK, *Respondent*.

UNIVERSAL INDEMNITY INSURANCE COMPANY, *Appellant*,

v.

CITY OF NEWARK, *Respondent*.

Opinion.

In the matter of the application for cancellation, and in the alternative, for reduction of personal property tax upon capital stock and accumulated surplus of Universal Insurance Company and Universal Indemnity Insurance Company, New Jersey corporations claiming to have business *situs* in New York.

Appearances:

For appellants, Child, Riker, Marsh & Shipman, Esqs., by Jehiel G. Shipman, Esq.

For respondent, Frank A. Boettner, Esq., by John A. Mathews, Esq.

WEAVER, *President*:

These two appeals, presenting common questions of law and fact, were tried together. Both corporations are managed by the same officers, operate from the same offices, and are represented by the same counsel. They are New Jersey corporations, maintaining registered offices at Newark, New Jersey, and business offices in New York City, managed and conducted by a New York corporation, Talbot, Bird & Company, Incorporated. With minor exceptions, all of their assets are kept in the State of New York.

The Board of Assessors of the City of Newark levied personal property assessments based upon their paid in capital and accumulated surplus. On appeal to the Essex County Board of Taxation, judgments reducing the assessments were entered by consent of the parties. Appellants seek to have these assessments cancelled, or, in the alternative, reduced upon the following grounds:

(1) The Company is not taxable in New Jersey because its business *situs* is in New York.

(2) (a) That reserves for unearned premiums, and (b) reserves for agency balances over ninety days old, should not be included in the capital and accumulated surplus, thereby reducing the capital and accumulated surplus by the amounts represented by said terms, and that after the deduction of property claimed to be exempt, no taxable capital or accumulated surplus remains.

(3) That cash on hand or on deposit is exempt, and should be deducted from the taxable capital and accumulated surplus.

Appellants are taxable under Section 307 of the General Tax Act, P. L. 1918, p. 858.

The questions herein presented were reviewed at length by this Board in an opinion filed July 7, 1936, in the case of Newark Fire Insurance Company *v.* City of Newark, wherein it was held that the establishment of a permanent business *situs* in another State does not preclude the taxation of intangible personal property of a domestic corporation of this State; that reserves for unearned premiums and agency balances cannot be deducted from accumulated surplus; and that cash on hand or on deposit is exempt from taxation.

Stipulations of fact and financial statements of the companies were offered in evidence, from which it appears that in the Universal Insurance Company judgment entered by the County Board the following items were deducted from the assets in determining the accumulated surplus:

Reserve for outstanding losses	$247,681.22
Book value of bonds and stocks over market value	916,125.92

Neither of these items is deductible from the assets in determining the accumulated surplus. See opinions of the Board in City of Newark *v.* Commercial Casualty Insurance Company and New Jersey Insurance Company *v.* City of Newark, filed July 14, 1936. The stipulations before this Board are to the effect that these items are deductible. While parties may stipulate facts, they cannot stipulate matters of law. The question whether these items are deductible from the assets in determining the amount of accumulated surplus is a question of law.

The taxable capital paid in and accumulated surplus of the Universal Insurance Company is in excess of the assessment as made by the Board of Assessors of the City of Newark, and under ordinary circumstances we would be required to restore the assessment as made by the Board of Assessors. However, we are without jurisdiction to change the judgment of the Essex County Board of Taxation, because it was entered by consent of the parties.

In Borough of Kenilworth *v.* Board of Equalization of Taxes, 78 N. J. L. 302; 72 A. 966, our Supreme Court said:

> "The difficulty, however, with the appeal is that there was no controversy before the county board to review, for the record here shows that the assessor's assessment was presented to the county board, and there, after full consideration, ratified and confirmed with the consent of the borough officials. Having then consented to the confirmation of its own assessment by the county board, it is not perceived how the petitioner can be said to be 'aggrieved,' or that 'any controversy' can be said to exist which can be the subject-matter for determination by the state board."

The same situation exists with respect to the appeal of the Universal Indemnity Insurance Company, except as to the amounts involved.

For the reasons stated, the appeals are dismissed.

EXHIBIT "C".

NEW JERSEY SUPREME COURT.

MAY TERM, 1937.

UNIVERSAL INSURANCE COMPANY, *Prosecutor*,

v.

STATE BOARD OF TAX APPEALS OF THE STATE OF NEW JERSEY and CITY OF NEWARK, *Respondents.*

UNIVERSAL INDEMNITY INSURANCE COMPANY, *Prosecutor*,

v.

STATE BOARD OF TAX APPEALS OF THE STATE OF NEW JERSEY and CITY OF NEWARK, *Respondents.*

Argued May 6, 1937. Decided August 31, 1937.

On Certiorari.

Before Justices Bodine, Heher and Perskie.

For the prosecutors, Child, Riker, Marsh & Shipman.
For the respondents, John A. Matthews (Andrew B. Crummy, on the brief).

The opinion of the court was delivered by PERSKIE, *J.*:

This is a taxation case. The facts in the case at bar are practically identical, save as to the names of the parties, their respective addresses here and in New York, and the figures, with those set forth in the case of Newark Fire Insurance Co. v. State Board of Tax Appeals (Supreme Court), 118 N. J. L. 525. The issues presented and decided in that case were (1) jurisdiction to tax; (2) taxation upon the item of unearned premium reserve; and (3) taxation upon cash. The issues presented for decision in the case at bar are (1) jurisdiction to tax; (2) taxation upon unearned premium reserve; (3) taxation upon reserve for

outstanding losses; and (4) taxation upon the item of book value of stocks and bonds over market value.

Deciding as we do that there is no difference in principle, for the purpose of taxation, between the item of reserve for losses and the item of unearned premium reserve, which we held to be taxable, our decision in the case of Newark Fire Insurance Co. *v.* State Board of Tax Appeals, *supra*, is dispositive of all issues in the case at bar save the fourth, wherein prosecutors contend that it was error to include the item of book value of its stocks and bonds over the market value thereof as a taxable asset.

In support of its contention it is argued that the regulations of insurance companies require book value of securities to be set up. These same regulations, it is pointed out, require the amortized value of the bonds and the market value of the stock to be set up under the heading of "Non-admitted assets." The board included these last two items as an asset, whereas prosecutors contend that the true value is to be determined by deducting the market value of stocks, and the amortized value of bonds from the book value and that this is done by first setting up the book value and then deducting the difference between the book value and the market or amortized value so that the net value is reflected in admitted assets with market value.

We perceive in this contention nothing more than another of the many varied attacks already made by the taxpayer upon the tax exacting authority in the time immemorial and continuing struggle between these two opposing forces. It presents nothing new. There is ample strength, ample precedent in the law to withstand and completely repel this assault. The basic weakness of this attack is that prosecutors proceed on the theory that exchange value or market value is the invariable test of true value under all circumstances. This is not so. In the words of our Court of Errors and Appeals in Newark v. Tunis, 82 N. J. L. 461; 81 Atl. Rep. 722 (opinion by Parker, J.), "* * * true value is not always to be ascertained by reference to selling price; * * * special circumstances may increase or depress market value without affecting true values or vice versa." And, on the other hand, as pointed out in that

opinion by reference to the opinion of the Supreme Court (81 N. J. L. 45; 81 Atl. Rep. 490—opinion by Swayze, J.) there are many factors, not by way of limitation but rather by way of example, such as "good will, dividend earning power, ability in management, public confidence," &c., which are not reflected in book value. Under the tax law it is the duty of the assessor to make an independent investigation of these and all other factors in determining the true value. The case of Newark *v.* Tunis, *supra*, stands, therefore, for the principle that, under ordinary and normal conditions, exchange or market value is a workable but not an invariable test of true value. "It (market value) is nothing more than a convenient index and evidence of true value under ordinary and normal conditions." Id. (at p. 463).

Thus the same court recently (1935) gave forceful illustration to the variability of the working rule. In determining true value, at a time of a depression when market prices were of no service, it held that, while county boards were not bound by bank figures (Newton Trust Co. *v.* Atwood, 77 N. J. L. 141; 71 Atl. Rep. 110; they must base their determination upon all the evidence) they were not obliged to rewrite them, and that since the bank made its own statement as to the value of its assets it could not, under the circumstances of that case, be heard to complain when those figures were accepted by local and state boards. Second National Bank *v.* State Board of Tax Appeals, 114 N. J. L. 573; 178 Atl. Rep. 96, and cases therein cited. The stated principles applicable to bank stock are also applicable to other stocks and bonds.

Prosecutors seek to distinguish the instant case from the Second National Bank case by pointing out, as already noted, that in the case at bar they were, pursuant to state requirements or regulations, obliged to set up market value of stock under the heading of "non-admitted assets," whereas in the Second National Bank case the book value was voluntarily set up. This is without merit. If prosecutors concluded the regulation complained of abortive, they should have sought recourse to the law; their statement had, moreover, no binding effect. Newton Trust Co. *v.* Atwood, supra. It was merely one of the factors which the

county board was duty bound to consider with all other factors in the cause. From all that has been written it is quite obvious that there is no hard and fixed rule and force that is to be given by those charged with the duty of determining true value to each and every factor pertinent and ascertainable in a given case. That necessarily must depend upon the facts and circumstances of each particular case. Having ascertained the applicable factors determinative of true value, we next consider how these factors are to be admeasured in money. Our answer is as follows: what would the property sell for, as of the day it was assessed, at a fair and bona fide sale by private contract; or what in the opinion of the assessor, based on his investigation and all the proofs, could be obtained for the property in money at a fair sale, as of the day it was assessed, between a willing seller and a willing buyer, that is one not obliged to sell dealing with one not obliged to buy?' New Jersey Bell Telephone Co. v. City of Newark, 118 N. J. L. 490.

"Taxation is an intensely practical matter * * *." Farmers Loan and Trust Co. v. Minnesota, 280 U. S. 204; 74 L. Ed. 371, 375. It is an intense reality. We are of the opinion that the rule stated in the Bell Telephone case is comprehensive, it is intensely practical and real, it embodies all of the factors necessarily determinative of true value.

We are not at all convinced that the taxing authorities did not, in the case at bar, give due and proper regard to all the facts and circumstances necessarily applicable in determining the true value of prosecutor's taxable property.

We desire to mark the fact that we have not overlooked the point made by respondents that the state board of tax appeals was without jurisdiction because the judgment of the Essex County Board of Taxation was entered by consent of the parties. Kenilworth v. State Board of Equalization of Taxes, 78 N. J. L. 302; 72 Atl. Rep. 966. We pause long enough to make the observation that the holding of the state board of tax appeals sustaining the point was reached only after it had given full consideration to all of prosecutor's points and had found them to be without merit. Because of either state and public concern, or section 11 of the

Certiorari act (1 Comp. Stat. 1709-1910, pp. 402, 406) or both, we have reached our result on the merits.

Judgment is affirmed, with costs.

EXHIBIT "D".

STATE BOARD OF TAX APPEALS, STATE OF NEW JERSEY.

NEWARK FIRE INSURANCE COMPANY, *Appellant*,

v.

CITY OF NEWARK, *Respondent*.

Opinion.

Filed July 7, 1936.

In the matter of the application for cancellation, and in the alternative, for reduction of a personal property tax upon capital stock and accumulated surplus of Newark Fire Insurance Company, a New Jersey corporation claiming to have a business *situs* in New York.

Appearances:

For Appellant, Arthur T. Vanderbilt, Esq.

For Respondent, Frank A. Boettner, Esq., by John A. Matthews, Esq.

WEAVER, President:

The appellant, Newark Fire Insurance Company, is a corporation organized under the laws of the State of New Jersey, having its registered office at Newark, New Jersey. Its main business and executive office is located in New York City. All books of the company, except those required by law to be kept in this State, are retained in its New York office, where its general accounts are kept. With the exception of a small deposit in New Jersey, all of its cash and securities are in banks located in New York City. For the

past six years, the general affairs of the company have been conducted from the New York office, the only business carried on from its registered office in Newark being a local or regional claim and underwriting department.

The Board of Assessors of the City of Newark levied upon the company's capital and accumulated surplus a personal property assessment in the sum of $1,069,000, which assessment was affirmed by the Essex County Board of Taxation on appeal. Appellant seeks to have this assessment cancelled (or in the alternative reduced), upon the following grounds:

1. The business *situs* of the company is in the City of New York.

2. (a) That reserves for unearned premiums, (b) reserves for taxes, and (c) agency balances over 90 days old, should not be included in its capital and accumulated surplus, thereby reducing the capital and accumulated surplus by the amounts represented by said items, and that after the deduction of property claimed to be exempt no taxable capital or accumulated surplus remains.

3. That cash on hand or on deposit is exempt and should be deducted from its taxable capital and accumulated surplus.

The company is taxable under Section 307 of the General Tax Act, P. L. 1918, p. 858, which provides:

> "Every fire insurance company and every stock insurance company other than life insurance shall be assessed in the taxing district where its office is situate, upon the full amount of its capital stock paid in and accumulated surplus; the real estate belonging to every such corporation, however, shall be taxed in the taxing district where such real estate is situated, and the amount of assessment upon said real estate shall be deducted from the amount of any assessment made upon the capital stock and accumulated surplus, as herein provided for; no franchise tax shall be imposed upon any such fire insurance company or other stock insurance company included in this section."

Appellant's claim that it is not taxable in this State because its personal property and business *situs* are located in New York is without merit.

The company is incorporated under the Insurance Companies Act of this State (2 C. S. p. 2839), Section 3 of which provides that its certificate of incorporation shall contain,—

> "The place where the principal office of said company is to be located and its general business conducted, which shall be within this State; * * *."

This provision has been carried into the amendment of 1929,—Chapter 6, page 18. The appellant accordingly is required to maintain its principal office and carry on its general business within the State of New Jersey.

Section 305 of the General Tax Act, P. L. 1918, p. 856, provides that:

> "Corporations of this State shall be regarded as residents and inhabitants of the taxing district where their chief office is located, and their personal property shall be taxed the same as that of an individual, except as in this act otherwise provided; * * *."

In Union Refrigerator Transit Company *v.* Kentucky, 199 U. S. 194, the United States Supreme Court said:

> "* * * there is an obvious distinction between the tangible and intangible property, in the fact that the latter is held secretly; that there is no method by which its existence or ownership can be ascertained in the State of its *situs*, except perhaps in the case of mortgages or shares of stock. So if the owner be discovered, there is no way by which he can be reached by process in a State other than that of his domicile or the collection of the tax otherwise enforced. In this class of cases the tendency of modern authorities is to apply the maxim *mobilia sequuntur personam,* and to hold that the property may be taxed at the domicile of the owner as the real *situs* of the debt, and also, more particularly in the case of mortgages, in the State

where the property is retained. Such has been the repeated rulings of this court. Tappan *v.* Merchants' National Bank, 19 Wall. 490; Kirtland *v.* Hotchkiss, 100 U. S. 491; Bonaparte *v.* Tax Court, 104 U. S. 592; Sturges *v.* Carter, 114 U. S. 511; Kidd *v.* Alabama, 188 U. S. 730; Blackstone *v.* Miller, 188 U. S. 189.

"If it occasionally results in double taxation, it much oftener happens that this class of property escapes altogether. In the case of intangible property, the law does not look for absolute equality, but to the much more practical consideration of collecting the tax upon such property, either in the State of the domicile or the *situs*".

In the case of Cream of Wheat Company *v.* County of Grand Forks, 253 U. S. p. 325, the United States Supreme Court held that the limitation of the Fourteenth Amendment upon the power of a State to tax the property of its residents which has acquired a permanent *situs* outside of the State does not apply to intangible property, even though it has acquired a business *situs* and is taxable in another State. In that case the Court said:

"The company was confessedly domiciled in North Dakota; for it was incorporated under the laws of that State. As said by Mr. Chief Justice Taney, 'It must dwell in the place of its creation, and cannot migrate to another sovereignty.' Bank of Augusta *v.* Earle, 13 Pet. 519, 588. The fact that its property and business were entirely in another State did not make it any the less subject to taxation in the State of its domicile. The limitation imposed by the Fourteenth Amendment is merely that a State may not tax a resident for property which has acquired a permanent *situs* beyond its boundaries. * * * The limitation upon the power of taxation does not apply even to tangible personal property without the State of the corporation's domicile, if, like a sea-going vessel, the property has no permanent *situs* anywhere. Southern Pacific Co. *v.* Kentucky, 222 U. S. 63, 68. Nor has it any application to intangible property, Union Refrigerator Transit Co. *v.*

Kentucky, *supra*, p. 205; Hawley *v.* Malden, 232 U. S. 1, 11, even though the property is also taxable in another State by virtue of having a 'business *situs*' there. Fidelity & Columbia Trust Co. *v.* Louisville, 245 U. S. 54, 59."

In Maguire *v.* Trefry, Tax Commissioner of Commonwealth of Massachusetts, 253 U. S. 12, 16, the United States Supreme Court said:

"In Fidelity & Columbia Trust Company *v.* Louisville, 245 U. S. 54, we held that a bank deposit of a resident of Kentucky in the bank of another State, where it was taxed, might be taxed as a credit belonging to the resident of Kentucky. In that case Union Refrigerator Transit Co. *v.* Kentucky, *supra*, was distinguished, and the principle was affirmed that the State of the owner's domicile might tax the credits of a resident although evidenced by debts due from residents of another State. This is the general rule recognized in the maxim '*mobilia sequuntur personam*,' and justifying, except under exceptional circumstances, the taxation of credits and beneficial interests in property at the domicile of the owner."

In the case of Citizens National Bank of Cincinnati *v.* Durr, 257 U. S. 99, the United States Supreme Court held that a membership in the New York Stock Exchange held by a resident of Ohio was a property right, intangible in nature, and that whether it was subject to taxation by Ohio taxing laws was a question of State law, determinable by the State Court. In that case the Court said:

"Exemption from double taxation by one and the same State is not guaranteed by the Fourteenth Amendment (St. Louis Southwestern Ry. Co. *v.* Arkansas, 235 U. S. 350, 367-368); much less is taxation by two States upon identical or closely related property interests falling within the jurisdiction of both, forbidden. Kidd *v.* Alabama, 188 U. S. 730, 732; Hawley *v.* Malden, 232 U. S. 1, 13; Fidelity & Columbia Trust Co. *v.* Louisville, 245 U. S. 54, 58."

It is apparent that intangible personal property which has acquired a business *situs* in a State other than that of the owner, may be taxed both in the State where it has acquired a business *situs* and in the State of residence of the owner. The proofs establish that the company pays no personal property tax in the State of New York, and is now seeking to escape taxation in the State of New Jersey.

The Board concludes that appellant is subject to taxation upon its capital and accumulated surplus in the State of New Jersey.

The company's reserve for unearned premiums cannot be deducted as a liability from its capital and accumulated surplus. In Inhabitants of the City of Trenton *v.* Standard Fire Insurance Co. of New Jersey, 77 N. J. L. 757; 73 A. 606, the Court of Errors and Appeals held that the reserve for unearned premiums is not exempt from taxation and cannot be deducted from the gross assets to ascertain the capital and accumulated surplus. The Court said:

> "This description is more applicable to an asset of the company set apart on its books to an amount equal to the cancellation value of its policies than it is to define a liability or debt. The fund is in the possession and control of the company, is invested by it in interest-bearing securities, and the profits yielded are substantial, and inure to the corporation. It seems not to be held on any trust, nor is it chargeable with any liability, other than that with which the capital and surplus are charged. It is a part of the surplus reserved from dividends. It may never be called upon to provide for the reinsurance of the company's risks or pay losses.
> * * *
>
> "The question arises, then, should the reserve fund be counted as a liability? In the case of People's Fire Ins. Co. *v.* Parker, Receiver, 34 N. J. Law, 479, affirmed 35 N, J. Law, 376, it was held by this court that the term 'accumulated surplus', in its application to stock companies, is well understood to refer to the fund they have in excess of their capital and liabilities, and that the word 'liabilities' there used means fixed liabilities, not contingent, citing State *v.* Utter, 34

N. J. Law, 493. An assessment, levied against the unearned premiums as a part of the accumulated surplus of the company, was in that case affirmed. The liabilities and losses upon policies issued and unexpired is not a fixed and definite liability, but merely contingent, and as such it should not be deducted from the gross assets in order to ascertain the capital stock and accumulated surplus."

The appellant claims that the sum of $71,765.65, set aside as a reserve for Federal taxes, is deductible from the assets in determining the amount of capital stock and accumulated surplus. The City claims that this is not a debt and should not be deducted. In ascertaining the amount of the capital stock and accumulated surplus, it is necessary to deduct from the assets, not only debts but also liabilities. While a tax is not a debt, it is a fixed liability and should therefore be deducted.

Appellant's claim for deduction of $119,109.72, representing agency balances over ninety days old, cannot be allowed, as this item represents neither debts nor liabilities. It is carried on the books of the company as an asset.

Appellant claims that the portion of its capital and accumulated surplus, representing cash on hand or on deposit, in the sum of $532,784.54, is exempt from assessment, by virtue of Chapter 165, Laws of 1933.

If cash on hand or on deposit owned by an individual taxpayer is exempt from taxation, appellant is entitled to deduct it from its capital stock paid in and accumulated surplus, as corporations which are taxable upon the amount of capital stock paid in and accumulated surplus are entitled to deduct therefrom the securities (or property) which are exempt in the hands of individuals. Newark City Bank *v.* Assessor of the 4th Ward of the City of Newark, 30 N. J. L. 13. It therefore becomes necessary to determine whether the statute exempts the cash and deposits in bank of an individual taxpayer.

Chapter 165 of the Laws of 1933, which is an amendment to Section 203 of the General Tax Act of 1918, provides for the exemption of—

"Cash on hand or on deposit and loans or collateral of savings banks, mutual savings banks and institutions for savings organized under the laws of this State."

The statute is ambiguous and is susceptible to two constructions,—one that cash on hand or on deposit owned by anyone is exempt, and that loans on collateral of savings banks, mutual savings banks and institutions for savings are exempt. The other construction is that cash on hand or on deposit in the various institutions mentioned in the Act, or cash of the institutions on deposit and loans on their collateral are exempt, in which case the exemption is limited to the institutions mentioned in the Act. If the latter construction be accepted,—that only cash on hand of the various institutions mentioned in the Act, and their deposits, are exempt, then the Act would be unconstitutional. Tippett *v.* McGrath, Col., 70 N. J. L. 110; 56 A. 134; affirmed 71 N. J. L. 338; 59 A. 1118, Essex County Park Commission *v.* Town of West Orange, 77 N. J. L. 575; 73 A. 511.

Where an act is susceptible to two constructions,—one making the Act constitutional and the other making it unconstitutional,—the courts have held that the construction which makes the Act constitutional must be accepted, for the reason that it must be inferred that the Legislature intended to pass a constitutional act. State (Fidelity Trust Co.) *v.* Vogt, 66 N. J. L. 86; 48 A. 580; Commercial Trust Co. of N. J. *v.* Hudson County Board of Taxation, 86 N. J. L. 424; 92 A. 263. Following this construction, it is necessary to hold that cash on hand or on deposit is exempt, without regard to ownership.

After allowing the items for which the company is entitled to either deduction or exemption, a taxable capital and accumulated surplus remains, in excess of the assessment as made.

For the reasons stated, the appeal is dismissed.

EXHIBIT "E".

NEW JERSEY COURT OF ERRORS AND APPEALS.

UNIVERSAL INSURANCE COMPANY, *Appellant*,

vs.

STATE BOARD OF TAX APPEALS OF THE STATE OF NEW JERSEY and the CITY OF NEWARK, Respondents.

UNIVERSAL INDEMITY INSURANCE COMPANY, *Appellant*,

vs.

STATE BOARD OF TAX APPEALS OF THE STATE OF NEW JERSEY and the CITY OF NEWARK, Respondents.

Argued February 4, 1938. Decided April 28, 1938.

On Appeal from the Supreme Court, Whose Opinion is Reported in 118, N. J. L. 538.

For the Appellants, Child, Riker, Marsh & Shipman.
For the Respondents, John A. Matthews.

Per CURIAM:

The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Perskie in the Supreme Court.

For affirmance—The Chancellor, Chief Justice, Parker, Case, Donges, Hetfield, Dear, Wells, Wolfskeil, Rafferty, Walker, JJ. 11.

For reversal—None.

For reversal as to second and fourth points—Case, Hetfield, Walker, JJ. 3.